No. 12251

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

J. HOWARD McGRATH, AS THE ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,

Appellants,

vs.

TADAYASU ABO, *et al.*,

Appellees.

BRIEF FOR APPELLEE TETSUO FRANK KAWAKAMI.

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IN THE

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J. Howard McGrath, as the Attorney General of the United States, *et al.*,

Appellants,

vs.

Tadayasu Abo, *et al.*,

Appellees.

BRIEF FOR APPELLEE TETSUO FRANK KAWAKAMI.

Facts Concerning Appellee Tetsuo Frank Kawakami.

Tetsuo Frank Kawakami was born in the United States in 1924. While at the Tule Lake Relocation Center, and in November 1944, while over 18 but under 21, the appellee renounced his citizenship. He claims that his renunciation was not his free and voluntary act but was the result of undue influence, mistake, misunderstanding and coercion. Following his renunciation he went to Japan.

In Japan he sought to return to the United States as a citizen of the United States and applied for a passport at the United States Consulate at Yokohama, Japan, in October 1946. In October 1947 the United States Consul

rejected his application for a passport on the ground he lost his United States citizenship by virtue of his renunciation at the Tule Lake Center.

In May 1948 appellee filed a complaint under Section 503 of the United States Nationality Act in the United States District Court for the Southern District of California, No. 8238-W. Thereafter, and on June 17, 1949, the Secretary of State, defendant in that proceeding, filed a motion to dismiss the complaint; and on October 4, 1949, upon stipulation of the parties said cause of action was dismissed on the ground that the rights of the appellee had been fully adjudicated in the judgment entered by the court below, in *Abo v. Clark,* United States District Court, Northern District of California, No. 25294-G, from which judgment the appellants in the instant appeal have taken their appeal.

The foregoing recital of facts cannot, and it is believed, will not, be disputed by appellants. See affidavit of A. L. Wirin filed concurrently herewith and see Appellants' Brief, page 80, note. For the convenience of this Court there are attached as exhibits hereto and marked respectively, Appendix A, B, and C, the following papers of the proceeding in the District Court for the Southern District of California: (A) the defendant's motion to dismiss the complaint, (B) the stipulation for dismissal, and (C) the order of dismissal.

ARGUMENT.

I.

The Renunciation Statute (8 U. S. C. 801(i)), in Purpose and Effect, Is Unconstitutional, Being in Violation of the United Nations Charter Because It Is Racially Discriminatory.

As pointed out below under Point II, and as conceded by appellants (App. Br. 17)[1] and as the record in this case makes it clear [R. 157-160], the enactment of 8 U. S. C. 801(i) was brought about specifically and for no other purpose than to apply to persons of Japanese ancestry. It was not intended to apply nor has it been applied to any persons other than Japanese. As such, the statute, being directed solely against persons of Japanese ancestry, is in direct and complete disaccord with the United Nations Charter to which the United States is a party and which provides for "respect for human rights and for fundamental freedoms without distinction as to race, sex, language, or religion" (59 Stat. 1035ff.; U. S. Code Cong. Service, 79th Congress, 1945, p. 964).

In the case of *Fujii v. State of California,* No. 17309 in the District Court of Appeal of the State of California, Second Appellate District, decided April 24, 1950 (not yet reported), the California Alien Land Law was held invalid. The point is made clear by the Court that legislation directed against a particular class of people solely because of their race cannot be sustained in view of our obligations under the United Nations Charter even though the statute on its face appears innocuous and does not in terms refer to race. Said the Court:

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[1]Appellants' Brief will be referred to as: (App. Br. 1 etc.).

"Democracy provides a way of life that is helpful; however its promises of human betterment are but vain expressions of hope unless ideals of justice and equity are put into practice among governments, and as well between government and citizen, and are held to be paramount. The integrity and vitality of the Charter and the confidence which it inspires would want and eventually be brought to naught by failure to act according to its announced purposes. Its survival is contingent upon the degree of reverence shown for it by the contracting nations, their governmental subdivisions and their citizens as well. This nation can be true to its pledge to the other signatories to the Charter only by cooperating in the purposes that are so plainly expressed in it and by removing every obstacle to the fulfillment of such purposes. . . .

"Clearly such a discrimination against a people of one race is contrary both to the letter and to the spirit of the Charter which, as a treaty, is paramount to every law of every state in conflict with it. The Alien Land Law must therefore yield to the treaty as the superior authority. The restrictions of the statute based on eligibility to citizenship, *but which ultimately and actually are referable to race or color,* must be and are therefore declared untenable and unenforceable." (Italics added.)[2]

Thus it is clear that the Renunciation Statute whose purpose and intent was directed solely against the Japanese and which statute has been used only against the Japanese, is invalid for the same reasons which prompted the California Court to declare the Alien Land Law invalid.

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[2]For the convenience of the Court and Counsel, there is being lodged with the Clerk of this Court copies of the *Fujii* opinion referred to above. Copies are also being furnished to counsel for appellants.

II.

All Renunciations at Tule Lake Made Under the Undenied Circumstances There Extant Are the Result of Coercion and Are, Therefore, Invalid.

This Court said the following in *Acheson v. Murakami*, 176 F. 2d 953, 954:

> "Since the records of this court show the government is contesting some four thousand similar cases of deportees who are seeking identical relief, we are giving consideration to these uncontested underlying facts, certain to have their effect upon the minds of the mass of deportees incarcerated at Tule Lake."

This Court thus had the very case at bar in mind when it decided *Murakami*.

Accordingly it is submitted that this Court has already decided in the *Murakami* case that the events occurring at Tule Lake, in their totality, were of such magnitude that they themselves render nugatory any renunciations that there took place because renunciation under such circumstances could not be, and were not, free and voluntary.

This matter was briefed *in extenso* in the *Murakami* case, No. 12082 of this Court, and was presented in a consolidated brief along with the arguments in *Clark v. Inouye* (175 F. 2d 740), No. 11839 herein. Because the record on this point in the case at bar is identical for all practical purposes with that in *Murakami* and *Inouye*,[3]

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[3]Appellants are in accord with appellee on this point. See Appellants' Brief, page 13, note 3.

the brief of appellees in these latter cases are referred to herewith and incorporated herein as though fully set forth. For the convenience of the court and counsel, pages 2-55 and 63-66 of the *Murakami* and *Inouye* Brief are attached hereto as Appendix D and constitute appellee's argument on this point.

III.

Appellee Has Now Been Denied a Right as a Citizen of the United States and, Regardless of Whether He Was so Denied a Right at the Time of Trial, Is Entitled to an Affirmance of the Lower Court's Judgment Because of the Intervening Events.

Assuming, *arguendo,* that were there no other facts in the picture as to appellee Kawakami, the principles of *Clark v. Inouye,* 175 F. 2d 740, would control, the situation before the Court now, consisting of facts which have occurred since the time of trial, make that decision inapplicable. As indicated in the statement of facts, above, and by the affidavit of A. L. Wirin presented to the Court concurrently herewith, appellee applied to the United States Consul in Yokohama, Japan, in October 1946, for a passport to return to this country. In October 1947, that passport was denied him on behalf of the then Secretary of State, the predecessor in office to appellant Acheson herein, on the ground that he had lost his citizenship by his Tule Lake renunciation. Thus was and is appellee denied a right as a national of the United States by appellant Acheson within the meaning of 8 U. S. C. 903 (*Ishikawa v. Acheson,* 85 Fed. Supp. 1 [D. C. D. Haw. 1949]).

Appellants have asked this Court to take notice of certain events which have intervened since the time of trial.

(See App. Br. 31, 62, 63, 80 and 81.) For example at page 63 of their brief appellants say:

> "it seems plain that the duty would have devolved upon this court to inquire into the change in jurisdictional facts."

We are in agreement with appellants as to this phase of the case and consider that such intervening facts, as to both parties, are properly acceptable by this Court.

It is not unusual that events take place subsequent to the time of trial, and, where material, the appellate court may be apprized of the facts, and may make an appropriate order because of their existence.

This Court has pointed out in its order dated February 20, 1948, in the case of *Williams v. Fanning*, No. 11317, that the rules of practice in this Court are the same as in the Supreme Court of the United States. This rule is embodied in Rule 9 of the Rules of this Court.

It has been the practice of the Supreme Court in an appropriate case to take notice of events intervening between a trial court's judgment and pending an appeal even though the non-existence of those events below affected the jurisdiction of the lower court or the appropriateness of the lower court's acts.

Thus, the Supreme Court said in *Watts, Watts & Co. v. Unione Austriaca Navigazione etc.*, 248 U. S. 9, 21:

> "This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require. . . . And in determining what justice now requires, the court must consider the changes in fact and in law which have supervened since the decree was entered below."

This same principle was announced in *Patterson v. Alabama,* 294 U. S. 600, 607:

> "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered. . . ."

Even as recently as the current term has the Supreme Court taken notice of events occurring since the time of trial below. See *Parker v. County of Los Angeles,* 94 L. Ed. (Adv. Op.) 133.

That this Court has full authority to enter such an order to affirm the lower court's judgment is seen from *Camp v. Gress,* 250 U. S. 308, 318:

> "In cases coming from Federal courts, the Supreme Court is given by statute full power to enter such judgment or order as the nature of the appeal or writ of error . . . requires."

This same power is specifically given this Court by the Code, 28 U. S. C. 2106.

Therefore, especially since consideration of such facts will *sustain* the judgment of the lower court, should this Court consider and accept the intervening facts showing the deprivation of right to appellee. Thus considered, the jurisdiction and judgment of the lower court must be sustained irrespective of the validity of appellants' arguments concerning the applicability of the *Inouye* case (App. Br. 60-65) for certainly now has appellee been deprived by appellant Acheson of a right as a citizen of the United States.

IV.

A Person Over 18 but Under 21 Cannot Renounce His Citizenship Under 8 U. S. C. 801(i).

This point was also involved in *Clark v. Inouye,* No. 12082 of this Court. In its decision therein, 175 F. 2d 740, the Court did not reach that point.

It is submitted that, regardless of any other arguments in the case, appellee Kawakami's purported renunciation was invalid because he was a minor under the age of 21.

Appellants' argument (App. Br. 83-97), viewed in its most favorable light, at best establishes but one thing; that there is perhaps an ambiguity in 8 U. S. C. 801 and 8 U. S. C. 803(b). Assuming, *arguendo,* that this is so, *Perkins v. Elg,* 307 U. S. 325, 337, directly controls the disposition of the case for it was there held that "rights of citizenship are not to be destroyed by an ambiguity." And *cf. Schneiderman v. United States,* 320 U. S. 118, 122, 125.

The action of Congress in quite clearly excepting from the provisions of 8 U. S. C. 803(b) all but subsections (b) to (g) *inclusive* of 8 U. S. C. 801 calls for the direct application of the maxim *expressio unius est exclusio alterius.*

No reported decision, other than that by the trial court in *Inouye,* 73 Fed. Supp. 1000, has been found on the precise point. However, the decision of the Board of Immigration Appeals in the case of *Ismael Acosta Her-*

nandez, No. 56196/251,[4] is completely apposite. That decision held squarely that a boy 19 years old could not expatriate himself under the provisions of 8 U. S. C. 801(j) because he was not yet 21. The reasoning of that decision is equally applicable to subsection (i) as appellants themselves have recognized (App. Br. 95). For the convenience of this Court that decision is set out in full herein as Appendix E.[5] Appellees submit that that decision is correct and should be applied by this Court in this case to subsection (i). *Cf. Attorney General v. Ricketts,* 165 F. 2d 193, 194 (C. C. A. 9, 1947).

Appellants' efforts to spell out some sort of a scheme that 18 years is *the* age of expatriation in the Nationality Act of 1940 (App. Br. 87) fall of their own weight. By pointing to the various sections wherein Congress did

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[4]This is the decision referred to by appellants at page 95, note 41 in their brief. The entire opinion of then Attorney General Clark, in reversing the decision of the Board of Immigration Appeals, and in which he administratively legislated, is as follows:

> "The decision and order of the Board of Immigration Appeals are reversed. I feel the Congress intended that the statute apply to persons under 21 who leave the United States for the purpose of evading or avoiding training and service in the land or naval forces. The view that the Congress failed to accomplish this purpose can, of course, be presented to the courts by the persons affected and I think under the circumstances a judicial determination of the question is desirable." (Decision of May 15, 1946.)

The instant case is an occasion for such a determination and to reject appellants' argument. Indeed the appellant McGrath's predecessor himself in the above opinion, in effect, suggests the rejection of his point of view.

[5]Attached to the decision of the Board of Immigration Appeals, and attached here as part of Appendix D, is a memorandum prepared by the Legal Adviser to the Department of State showing that the same reasoning is applicable to subdivision (a) of 8 U. S. C. 801. Appellants themselves argue that the same rule is applicable for subdivision (i) as for subdivision (a) (App. Br. 92).

make 18 years the age (App. Br. 87), and in one case gave certain rights up to 23 in view of *Perkins v. Elg* (App. Br. 91), they have emphasized that where Congress meant to change the common law rule of *Perkins v. Elg,* 307 U. S. 325, it specifically said so.

It is to be observed that the italicized portions of appellants' quotation from page 69 of *Codification of the Nationality Laws* (House Committee Print, 76th Cong., 1st Session) (App. Br. 88) is pure *dictum,* if one may so characterize a committee report. The report was speaking of *this subsection,* namely subsection (b) of 8 U. S. C. 803. That subsection is specifically limited to subsections "(b) to (g) *inclusive*" (italics added), of 8 U. S. C. 801. And so also must the quotation from page 67 of Codification of the Nationality Code (App. Br. 89) be read in its context, namely with reference to "this provision"—8 U. S. C. 803(b).

Similarly the excerpt from Sen. Rep. 2150, 76th Cong., 3rd Sess., p. 4 (App. Br. 89) speaks of "certain *specified* acts" of expatriation (italics added)—not *all* acts of expatriation.

In the light of the strong and positive holding of *Perkins v. Elg,* 302 U. S. 307, 337 that "rights of citizenship are not to be destroyed by an ambiguity," the weakness of appellants' argument becomes apparent. Witness these words in their effort to arrive at Congressional intent: "speculate"; "possible"; "plausible" (App. Br. 90); "might have been deemed"; "might have obtained" (App. Br. 91); "speculations"; "possible" (App. Br. 92); "may have had good reason"; "inferable" (App. Br. 93). It is submitted that the precious right of citizenship (see *Schneiderman v. United States,* 320 U. S. 118, 122, 125) cannot be so nonchalantly and conjecturally obliterated.

The Nationality Act in 1940 in which *for certain specific acts* the age of expatriation was made 18, having been passed subsequently to the decision of *Perkins v. Elg,* 302 U. S. 307 (1939), the conclusion is inescapable that Congress intended the rule of that decision to apply where it had not changed it. Certainly speculation and surmise cannot serve to change that general rule and result in loss of citizenship for Kawakami.

While administrative construction is entitled to great weight (App. Br. 96), where that construction is contrary to the terms of the statute, it will not be followed by the Court. (See *Bay Ridge Operating Co. v. Aaron,* 334 U. S. 446.)

And finally, it is clear that rather than fly in the face of what appellants have called the "manifest" Congressional intent (App. Br. 97), the situation that one can renounce if outside this country at the age of 18 but cannot do so if inside this country, is precisely what Congress intended. In the first place, Congress said so in 8 U. S. C. 803(b). In the second place, Congress was not unmindful of the existence of subsection (i). Thus at the same time it passed 8 U. S. C. 803(b) it also passed 8 U. S. C. 803(a). That latter subsection recognizes a distinction between 8 U. S. C. 801(f) for it there says that:

> "Except as provided in subsections (g), (h), and (i) of section 401 (8 U. S. C. 801), no national can expatriate himself, or be expatriated, under this section *while within the United States* or any of its outlying possessions, but expatriation shall result from the performance within the United States or any of its outlying possessions of any of the acts or the fulfillment of any of the conditions specified in this section if and *when the national thereafter takes up a residence abroad.*" (Italics added.)

Here then, is specific recognition by Congress of a distinction between expatriation while within and expatriation while without the United States. It is to be noted that all of the subsections of 8 U. S. C. 801 except subsections (g), (h), and (i) refer to acts outside the United States.

For this Court to give the construction contended for by appellants would be to re-write the statute. This the Court will not do. As the Supreme Court has said: "It is not for (the Courts) to add to the legislation what Congress pretermitted." (*United States v. Monia,* 317 U. S. 424, 430.)[6]

Conclusion.

The judgment of the Trial Court should therefor be affirmed.

Respectfully submitted,

A. L. Wirin,

Fred Okrand,

Attorneys for Appellee Tetsuo Frank Kawakami.

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[6]And compare the action and language of the Michigan Supreme Court in *General Motors Corp. v. Michigan Unemp. Comp. Comm.,* 321 Mich. 724, 34 N. W. 2d 497, 498: "The Court is in duty bound to construe and sustain a legislative enactment as written if it is not violative of constitutional provisions. Whether this amendment to the statute is or is not unduly restrictive as to an employee obtaining unemployment compensation, is a matter for legislative determination."

APPENDIX A.

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In the United States District Court, in and for the Southern District of California, Central Division.

Tetsuo Frank Kawakami and Isao James Kuromi, Plaintiffs, v. Dean Acheson, as Secretary of State, Defendant. No. 8238-WM.

Motion to Dismiss Complaint.

The defendant moves the Court as follows:

1. To dismiss the action as to the above named plaintiffs because the issues as to them have already been fully adjudicated in another action between the same parties, to-wit: In case No. 25294-G, Abo, *et al.* v. Clark, *et al.*

in the District Court of the United States in and for the Northern District of California.

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APPENDIX B.

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In the United States District Court, Southern District of California, Central Division.

Tetsuo Frank Kawakami and Isao James Kuromi, Plaintiffs, vs. Dean Acheson, as Secretary of State, Defendant. No. 8238-WM.

Stipulation for Dismissal.

It Is Stipulated that the defendant's motion to dismiss the complaint may be granted, and that the complaint may be dismissed without prejudice.

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A. L. Wirin,
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Robert J. Kelleher,
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By Robert J. Kelleher,
Robert J. Kelleher,

Attorneys for Defendant.

APPENDIX C.

Order of Dismissal.

The above matter having come on for hearing upon the motion of the defendant to dismiss the complaint, and upon the stipulation that said complaint may be dismissed, it appearing to the court that as to the plaintiffs the issues herein have already been fully adjudicated in another action the same parties, to-wit: In case No. 25294-G, Abo, *et al.* v. Clark, *et al.,* in the District Court of the United States in and for the Northern District of California, and good cause appearing therefor.

It Is Ordered that the action herein be dismissed without prejudice.

Dated: This 4, day of October, 1949.

(S) Wm. C. Mathes,
Judge, United States District Court.

APPENDIX D.

Pages 2 through 55 and pages 63 through 65, Brief for Appellees in Clark vs. Inouye and Acheson vs. Murakami, Nos. 11839 and 12082, in the United States Court of Appeals for the Ninth Circuit.

APPENDIX E.

Decision of United States Department of Justice, Board of Immigration Appeals, dated December 13, 1945, in the case of Ismael Acosta-Hernandez, No. 56196/251—El Paso and Memorandum dated May 6, 1946, prepared by the legal advisor to the Department of State.